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No. 826871

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SUPREME COURT  
OF THE STATE OF WASHINGTON  
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HUMPHREY INDUSTRIES, LTD.,

Appellants,

v.

CLAY STREET ASSOCIATES, LLC, et al.,

Respondents.

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**RESPONDENTS' SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

This case represents the last chapter in a long and tortured series of business relationships involving Humphrey Industries Ltd. and its principal, George Humphrey (collectively “Humphrey”), on the one hand, and several business partners, including respondents Joseph and Ann Lee Rogel, their son, Scott Rogel, and ABO Investments, LLC – a company owned by Gerry Ostroff – on the other. The parties created several single-asset limited liability companies owning discrete parcels of commercial real estate. Business relations between Humphrey and the other LLC members soured and became dysfunctional, culminating in Humphrey filing a series of (for him, unsuccessful) lawsuits.

This case, the last of the disputes, concerns Clay Street Associates, LLC (“Clay I”). Clay I was formed to develop an industrial warehouse property. Humphrey’s relations with the other Clay I members became toxic, but he refused to resolve the situation by selling the property and dissolving the LLC. Respondents retained counsel, who guided them through a merger that allowed them to sell the Clay I property and end the parties’ unworkable relationship without seeking a judicial dissolution.

Humphrey dissented from the merger and demanded payment of the fair value of his Clay I interest. He asserted an outlandishly high value for the Clay I property – far more than the property sold for several months after the merger in an arms-length, open-market transaction. Hoping to avoid yet another round of litigation, Clay I offered Humphrey

more than the remaining members had received from the market sale. Humphrey rejected the offer and, as in prior cases, insisted on taking the matter to trial.

After a one-week bench trial in June 2007, the Superior Court found the value of Humphrey's interest on the merger date, December 7, 2004, to be \$231,947.17. That was \$93,429 less than the value respondents had offered, and \$373,853 less than Humphrey demanded. The trial court found Humphrey's payment demand to be well outside the mainstream of reasonably based valuations and unsupported by substantial or credible evidence.

In post-trial proceedings, the trial court found Humphrey's pursuit of dissenters' rights to have been arbitrary and vexatious and awarded attorneys' fees to respondents. Humphrey appealed, but failed to assign error to a single finding of fact supporting the trial court's fee award, and failed to challenge properly most, if not all, trial findings. The Court of Appeals nevertheless considered all arguments made in the body of Humphrey's brief. It unanimously concluded that substantial evidence supported the trial court's findings and the trial court properly exercised its discretion in awarding respondents their fees and costs. The Court of Appeals and the trial court reached the correct result. Respondents respectfully ask this Court to affirm their decisions.

## II. ISSUES PRESENTED

1. Did the Court of Appeals correctly affirm the trial court's fee award determinations and hold that no abuse of discretion occurred, given the substantial evidence and related findings establishing that:

(a) Humphrey's intransigence forced Clay I to embark on the merger that gave rise to Humphrey's dissenters' rights;

(b) Clay I lacked liquid assets with which to pay Humphrey for his share of Clay I until the LLC's single asset, a warehouse property, sold; and, despite respondents' best efforts, the property did not sell until several months after the merger, which prevented respondents from strictly complying with the statutory payment deadline;

(c) Humphrey rejected Clay I's "windfall" payment offer and sought a far greater recovery than any other member received, based on a personal valuation unsupported by credible evidence and well outside the mainstream of reasonable valuations; and

(d) The trial court awarded Humphrey an additional payment of roughly one-third of what Clay I had twice offered and hundreds of thousands of dollars less than Humphrey demanded.

2. Did the Court of Appeals correctly determine that its rejection of one evidentiary basis for the trial court's arbitrary, vexatious, or not in good faith finding did not warrant remand, given the multiple additional bases for that finding and the limited due process rights afforded in fee award proceedings?

### III. STATEMENT OF FACTS

The background facts are detailed in respondents' briefs to the Court of Appeals and that court's opinion, and are not repeated here. Key facts particularly relevant to Humphrey's ongoing attempt to avoid liability for respondents' fees and to recoup his own include:

- Friction between Humphrey and the other members caused Clay I to become dysfunctional. CP 2307-08 ¶¶ 6, 8; *see* RP 281, 348-51.

- Gerry Ostroff, Clay I's manager, was a credible witness.<sup>1</sup> CP 2307 ¶ 3. Ostroff did not take sides; he "just wanted the bickering to stop." RP 348. Ostroff decided that selling the LLC's property and dissolving the LLC was the most reasonable solution to the other members' unworkable relationships. CP 2307-08 ¶ 8.

- The LLC agreement required unanimous agreement for a sale. Humphrey withheld approval. CP 2308 ¶ 9; RP 353.

- Given Humphrey's intransigence, a lawyer recommended Clay I merge into a new LLC allowing non-unanimous sales. CP 2308 ¶¶ 9-10; RP 354-57. Humphrey dissented from the merger and demanded payment of the fair value of his Clay I interest. Ex. 45 [CP 272]; CP 271, 2309-10 ¶ 18. By statute, that required Clay I to pay Humphrey by 30 days after the merger's December 7, 2004 effective date. RCW 25.15.460.

<sup>1</sup> Mr. Ostroff, who was originally a passive investor, was forced to take over as the LLC's manager after Mr. Humphrey abruptly resigned from that position.

- Clay I was in dire financial straits in late 2004. Its property was 45 percent vacant and the LLC lacked funds for needed improvements or mortgage or tax payments. CP 2309-10 ¶ 18; RP 380-81. Ostroff asked each member to infuse \$10,000 into the LLC. All but Humphrey did so. The property still lost \$29,340 in 2004. *Id.*

- Clay I's financial situation and single-asset status meant it could not pay Humphrey the fair value of his Clay share I until its property sold. CP 2315-16 ¶ 43; RP 439. The property finally sold for \$3.3 million in May 2005. CP 2311 ¶ 25. Significantly, the buyer's lender appraised the property at \$2.75 million. RP 418, 521-23, 641-42.

- Clay I's former lawyer calculated the fair value of Humphrey's share as of December 7, 2004 (the effective date of the merger) to be \$174,710.87. RP 384; CP 3275-77. He added interest to that amount and on May 27, 2005, sent Humphrey a check for \$181,192.64. CP 2316 ¶ 44; CP 3275-77. Pursuant to counsel's advice, Clay I believed in good faith that despite the delayed payment, it had complied with the LLC Act. CP 2308 ¶¶ 10-11, 2315-16 ¶ 43; RP 425-26.

- Humphrey demanded an additional \$424,607.05 (for a total payment of \$605,799.69), based on his \$4,109,920 property valuation. CP 2316 ¶ 44; Ex. 76 [CP 65-66]; RP 399-400. His valuation did "not have substantial or credible evidence to support it" and was "well outside the mainstream of reasonably-based valuations[.]" CP 2314 ¶¶ 39-40.

- Clay I then hired an appraiser. RP 401; CP 3285. The appraiser concluded the property's value on December 7, 2004 (when it was nearly half-vacant) was \$3.15 million. CP 2313 ¶ 34.

- Based on the appraisal, Clay I recalculated Humphrey's interest on December 7 to be \$325,376 (one-fourth of \$3.15 million less Humphrey's share of the original loan). CP 3285-86; RP 412-14. In July 2005, Clay I offered Humphrey the difference between \$325,376 and its prior \$181,192.64 payment. CP 2324, 3285; RP 412-14. The offer, described by the trial court as a "substantial windfall," CP 2324, would have given Humphrey \$60,000 more than any respondent received from the sale, since respondents paid sales-related costs that they did not deduct from Humphrey's proposed share. RP 413. (He would have received that windfall even though he refused to contribute his share of the late 2004 capital call that kept the property afloat until the May 2005 sale.) Respondents made the offer hoping to avoid yet another round of acrimonious litigation. CP 2322-26, 3166-68; *see infra* at 7-9.

- Humphrey rejected the offer and, in August 2005, began serving an earlier-filed lawsuit on respondents. RP 414; CP 3177-86; *see* CP 2055.

- Joseph and Ann Lee Rogel, a retired couple who were passive investors in Clay I, tried to extricate themselves from the lawsuit. Humphrey rejected their efforts. CP 2325, 2329 ¶ 5, 3828-66, 3870-80.

- Unaware of Humphrey's lawsuit, Clay I filed a judicial valuation petition on July 29, 2005. CP 265 ¶ 12, 317-19; RP 414. The court later consolidated Clay I's action with Humphrey's. CP 3867-69.

- In October 2006, Clay I made a CR 68 offer to Humphrey under which Humphrey would receive the same additional valuation amount as Clay I offered in July 2005 (\$144,183.86), plus additional interest, for a total payment to Humphrey of \$346,469.23. CP 2324-25, 2327, 3308-09.

- Humphrey rejected the offer. CP 2325, 2327. The matter proceeded to a June 2007 trial. The trial court found Clay I had acted in good faith and found its appraiser's sales-price-based analysis more credible than the court-appointed appraiser's valuation. CP 2307-08 ¶¶ 8-11, 2312-15 ¶¶ 29-41. (The court-appointed appraiser had improperly disregarded the property's actual sales price due to groundless "fire sale" accusations by Humphrey. CP 2310 ¶ 19, 2313 ¶ 32.)

- The court found Humphrey's interest in the property on the merger date to be \$231,947.17. CP 2317, 2319. Since Clay I had already paid \$181,192.64, the court awarded Humphrey an additional \$50,754.53, plus \$9,833.69 in interest, for a total of \$60,588.22. *Id.* After two years of litigation and a weeklong trial, Humphrey recovered roughly one-third of the additional \$144,183 plus interest that Clay I had previously offered. CP 2324-25; *see* CP 3308-09.

Humphrey's stubborn insistence on litigation had little to do with the merits. Instead, it was a manifestation of Humphrey's animosity toward the other members. CP 2307 ¶ 6; *see* CP 3828-31. Humphrey thus

pursued litigation despite having received a “windfall” offer, CP 2324-25, and even though three different fact-finders had previously rejected similar claims by Humphrey against other former LLC co-members.

In 2004, for example, Humphrey refused to agree to sell property owned by an LLC in which Humphrey and Joseph and Ann Lee Rogel each had an interest. That led to an arbitration in which arbitrator David Soukup ruled in favor of Joseph and Anne Lee Rogel and found that Humphrey had breached fiduciary duties to them and other members of the LLC. CP 2870-73. Nine months later, in July 2005 (the month Humphrey also rejected Clay I’s appraisal-based fair value offer) the same arbitrator found that since the 2004 arbitration:

*[T]he relationship between the parties has deteriorated to the point where it has become dysfunctional. That is clearly established both by the obvious and extreme animosity between the parties and by the facts underlying the disputes arbitrated here. The Humphrey Industries position is that the L.L.C. should nevertheless continue to operate with future disputes to be resolved by mediation or arbitration....That is not feasible. Under present circumstances, and without intending to be facetious, the L.L.C. would need to hold annual arbitrations, instead of annual meetings, to conduct its business.*

*In addressing the individual issues presented here it is apparent that a number of breaches of fiduciary duty and of obligations as managing partner by Humphrey Industries have created a situation where not only is there cause to wind up the L.L.C., that is the only rational solution.*

CP 2875-76 (emphasis added).

In August 2006, a different arbitrator, Thomas Brewer, in a different matter involving different LLCs, entered an order dismissing all

of Humphrey's claims against the Rogels and ABO Investments (Gerry Ostroff's company). CP 2880-93. He, too, recognized that Humphrey's opposition to dissolution and insistence on arbitrating each dispute,<sup>2</sup> CP 2885, would lead to "'government of the affairs of the LLCs by arbitration,' and accompanying paralysis[.]" CP 2886. He also remarked on the poisonous relations among the parties:

This unfortunate case presented an excellent example of the wisdom of Washington's "business judgment" rule: *The Managing Members here found themselves at the helm of two dysfunctional and irretrievably sundered LLC's, where a consensus course of action among the Members simply was not possible.*

CP 2887 (emphasis added). The arbitrator ordered Humphrey to pay \$220,566.06 in legal fees and expenses to the prevailing parties. CP 2892.

Humphrey then twice brought claims against Joseph and Ann Lee Rogel involving yet another LLC. The King County Superior Court dismissed Humphrey's first action with prejudice in April 2005. CP 3835-45. Humphrey tried unsuccessfully to revive that dismissed cause of action in the instant case. CP 2552-53; *see* CP 2325, 2329-31, 3820-66.

In connection with their post-trial motions for fees and costs, respondents provided information about these prior disputes and informed the trial court of Clay I's October 2006 Rule 68 offer.<sup>3</sup> CP 2453-80, 3155-

<sup>2</sup> Humphrey took a similar position in this case. *See* CP 45-46 ¶ 29.

<sup>3</sup> To reflect their retention of new attorneys in September 2006 and Humphrey's rejection of their new counsels' renewed effort to resolve this case without trial, respondents Clay I, Scott Rogel, and ABO Investments voluntarily limited their fee and cost request to expenses incurred after Humphrey rejected their October 2006 CR 68 offer. CP 2327-28, 3161-65, 3308-09.

3397, 3430-32. They also reminded the trial court of Humphrey's rejection of their July 2005 fair-value offer. *Id.*; *see* RP 293. Based on this information, the fact Humphrey only recovered some one-third of what respondents offered long before trial, his adherence to a baseless valuation, and his insistence on pursuing baseless individual claims against Joseph and Ann Lee Rogel, the trial court found Humphrey had acted arbitrarily, vexatiously, and not in good faith with respect to his dissenters' rights. CP 2320-32. The court awarded respondents their fees and costs pursuant to RCW 25.15.480(2)(b) and CR 68. *Id.*

Humphrey also sought fees based in part on Clay I's necessity-driven delay in paying fair value to Humphrey. CP 1682-1911, 1939-92, 2481-93. According to Humphrey, that delay equated to a failure to substantially comply with the dissenters' rights provisions of RCW 25.15 and mandated an award of fees. *E.g.*, CP 1942-43. The trial court denied his request. CP 2326-27.

Humphrey appealed, making nine assignments of error and identifying at least as many issues. He failed, however, to assign error to a single finding entered in support of the fee award. He also failed to comply with RAP 10.3(g) and 10.4(c) in his attempt to assign error to the trial court's valuation findings. *See* App.'s Revised Opening Br.; Respondents' Br. at 3-5; Op. at 4-5. <sup>4</sup>

<sup>4</sup> Unchallenged findings are verities on appeal. *E.g.*, *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

A unanimous Court of Appeals affirmed. In affirming the denial of Humphrey's fee request, it explained that whether or not Clay I substantially complied with RCW 25.15's time-of-payment requirements, the trial court had discretion to decline to award fees. Op. at 8. It further explained that given the circumstances, i.e., Clay I's lack of liquid assets, Humphrey's refusal to sell Clay I's property despite the LLC's inability to function, the resultant forced merger, and the lack of any evidence the short payment delay oppressed or otherwise prejudiced Humphrey, Clay I had substantially complied with the statute. Op. at 8-10.

The Court of Appeals also affirmed the award of fees to respondents. In so doing, it held that the trial court erred in using Humphrey's rejection of Clay I's CR 68 offer as evidence supporting its finding that Humphrey's conduct was arbitrary, vexatious, or not in good faith. Op. at 14. That did not necessitate reversal, however, because the evidence and other findings were more than sufficient to affirm:

Humphrey has the right to pursue its interests under the [dissenter's] statute, but must act reasonabl[y] in doing so.

The LLC was dysfunctional, but Humphrey objected to selling the property. Then Humphrey objected to Clay Street's initial payment and demanded an additional \$424,607 based on an alleged value of over \$4.1 million, a figure the court ultimately rejected as unsupported by substantial or credible evidence. Then Humphrey rejected the offer of an additional \$150,764, by which Humphrey would have received \$65,426 more than the other members. The court eventually awarded \$45,524 less than Humphrey had been offered.

Further, the evidence points to Humphrey as the source of the acrimony and resulting dysfunctional relationships. In prior arbitrations involving many of the

same investors but different LLCs, arbitrators found Humphrey's conduct wanting. One arbitrator found that Humphrey breached its fiduciary duty and that its conduct left winding up "the only rational solution."

Finally, Humphrey's litigiousness was itself unreasonable. Humphrey engaged in multiple lawsuits against these ...partners. Each of these disputes involved similar circumstances and a similar trail of rejected offers. In each, Humphrey lost. This included actions against Joseph & Ann Lee Rogel, who were retired passive investors....As to [one LLC], Humphrey's lawsuit against them was twice dismissed. Humphrey refused to dismiss them from this litigation, despite admitting it had no claim that they were involved in any misconduct.

Op. at 14-15. In so holding, the Court of Appeals relied on the trial court's evidentiary narrative and formal findings, the valuation trial findings incorporated into the fee award, and arguments made by the parties on appeal. *See generally* CP 2320-32.

Humphrey now seeks review of three components of the Court of Appeals' decision: (1) its use of a substantial compliance analysis that considered the circumstances causing Clay I's payment delay; (2) its determination the non-CR 68 related evidence was sufficient to uphold the trial court's finding that Humphrey acted arbitrarily, vexatiously, or not in good faith; and (3) its failure to order a remand to reassess whether Humphrey's conduct was arbitrary, vexatious, and in bad faith. Based on the trial court findings of fact and conclusions of law described herein, in the Court of Appeals' decision, and in prior briefs submitted to this Court and the Court of Appeals, respondents respectfully ask this Court to affirm the Court of Appeals and end this animosity-driven litigation.

#### IV. LEGAL ARGUMENT

##### A. The Court of Appeals Correctly Affirmed the Trial Court's Denial of Humphrey's Fee Request

Humphrey sought a fee award based on an alleged failure by the LLC to substantially comply with the LLC Act's dissenter's rights provisions. Both the trial court and the Court of Appeals concluded that a substantial compliance analysis under RCW 25.15.480(2)(a)<sup>5</sup> involves consideration of the facts and whether defendant sufficiently adhered to the statute to carry out the legislative intent. Op. at 8; CP 2315-16 ¶ 43. Their approach is consistent with Washington law governing substantial compliance inquiries in non-jurisdictional contexts. *In re Santore*, 28 Wn. App. 319, 327, 623 P.2d 702, *rev. denied*, 95 Wn.2d 1019 (1981); accord *Black's Law Dictionary* 1566 (9<sup>th</sup> ed. 2009); see also *City of Seattle v. Pub. Employment Relations Comm'n*, 116 Wn.2d 923, 928, 800 P.2d 1377 (1991) (citing *Santore*); Answer to Pet. at 9-11.

It is also consistent with an analogous Georgia decision, *VSI Enterprises, Inc. v. Edwards*, 238 Ga. App. 369, 518 S.E.2d 765 (1999). *VSI* involved a statute that required dissenters to tender their shares to the corporation, but the dissenter could not find her stock certificate and thus

<sup>5</sup> RCW 25.15.480(2)(a) provides:

The court *may* also assess the fees and expenses of counsel and experts for the respective parties... (a) Against the limited liability company ... if the court finds the limited liability company did not *substantially comply* with the requirements of this article[.]

(Emphasis added).

could not comply. Thus she, like Clay I here, was unable to satisfy a statutory requirement. The court considered the circumstances and held that substantial compliance does not require tender when “tender is impossible[.]” *VSI*, 518 S.E.2d at 769. Use of that practical approach is fundamentally the same as what the courts have done here.

The *VSI* court also considered whether, given the circumstances, “the legislative purpose [was] fully satisfied without harm to the statutory scheme[.]” 518 S.E.2d at 770. Here, the Court of Appeals engaged in a similar inquiry. The legislative purpose for requiring prompt payment of a dissenter’s share is to “avoid oppression,” Op. at 10, and “protect the property rights of dissenting shareholders from actions by majority shareholders which alter the character of their investment.”” *China Prods. N. Am., Inc. v. Manewal*, 69 Wn. App. 767, 773, 850 P.2d 565 (1993) (quoting 12B W. Fletcher, *Private Corps.* § 5906.10 (rev. perm. ed. 1990)). The trial court found that purpose satisfied here by Clay I’s interest payment to Humphrey. CP 2315-16 ¶ 43.

But even if use of a circumstance-based analysis for assessing substantial compliance were improper, and the Court of Appeals and trial court therefore erred in finding Clay I substantially complied with the dissenters’ rights statutes, that would not warrant reversal. As the Court of Appeals recognized, RCW 25.15.480(2)(a) gives trial courts discretion to refuse to award fees to a dissenter, even where an LLC has failed to substantially comply with the statute. Op. at 8; *see supra* n.5. It does so to encourage settlement:

*The purpose of these grants of discretion*  
[regarding] counsel fees is to increase the incentives of  
both sides to proceed in good faith ... to attempt to resolve  
their disagreement without ... a formal judicial appraisal[.]

WASH. BUSINESS CORP. ACT COMMENT §§ 13.31 (emphasis added)  
(reproduced in Stewart M. Landefeld, *et al.*, WASH. CORPORATE LAW:  
CORPS. & LLCs App. A-178 (2002)).

Notably, Humphrey has never claimed the trial court abused its discretion in declining to award fees under RCW 25.15.480(2)(a) and it is too late for him to do so now. RAP 2.5(a). In any event, given the circumstances here – Humphrey having forced the merger by refusing to agree to sell Clay I’s single asset so the dysfunctional LLC could be dissolved, Clay I’s lack of liquid assets with which it could pay Humphrey within 30 days of the merger’s effective date, and its good-faith reliance on legal advice that the LLC Act allowed a delayed payment – the trial court’s exercise of discretion to deny a fee award to Humphrey was eminently reasonable and the Court of Appeals properly so held. CP 2308-10 ¶¶ 9-11, 17-18, 2315-16 ¶ 43.

**B. The Court of Appeals Correctly Affirmed the Trial Court’s Finding That Humphrey Acted Arbitrarily, Vexatiously, or Not in Good Faith**

Humphrey challenges the Court of Appeals’ affirmance of the finding he acted arbitrarily, vexatiously or not in good faith. He bases his challenge on a mistaken claim that the trial court relied solely on his rejection of Clay I’s CR 68 offer in finding his conduct to be arbitrary and vexatious. He further argues that the Court of Appeals did not give

sufficient weight to evidence of his alleged reasonableness. *See* Pet. for Review at 7-8, 15-20.

Humphrey misstates the trial court's analysis and misapprehends the standard of review. The trial court found that Humphrey's conduct was arbitrary, vexatious or not in good faith. CP 2328, 2331. Reviewing courts must accept that finding if it is supported by substantial evidence, i.e., evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). To the extent the trial court's finding is based on conflicting evidence, review is limited to determining whether "the evidence most favorable to the prevailing party supports the challenged findings." *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963 (1984). Under this standard, Humphrey's interpretation of the evidence favoring him and his claims of good faith are largely irrelevant.

The evidence favorable to respondents and which is cited in the trial court's fee award is substantial.<sup>6</sup> It includes Humphrey's rejection of the July 2005 non-CR 68 offer that would have afforded him a "windfall" of \$60,000 more than any respondent received; Humphrey's pattern of refusing to compromise and instead pursuing unsuccessful litigation to the

<sup>6</sup> CP 2320-32. Although some of this evidence is described in narrative form rather than in numbered paragraphs, that does not preclude its consideration on review. *See State v. Williams*, 96 Wn.2d 215, 220-21, 634 P.2d 868 (1981) (no matter how denominated, Court assesses whether the evidence supports the findings of fact and whether the findings support the conclusions of law); *In re Marriage of Griffin*, 114 Wn.2d 772, 777, 791 P.2d 519 (1990) ("[i]n the absence of a written finding on a particular issue, an appellate court may look to the oral opinion to determine the basis for the trial court's resolution of the issue.").

bitter end; his mistreatment of Joseph and Ann Lee Rogel; and his insistence on payment pursuant to a \$4.1 million property valuation “not based on credible, substantial evidence” and “well outside the mainstream of reasonable valuations.” CP 2314 ¶¶ 39-40, 2320-32.

Such conduct is precisely the kind courts consider in deciding whether to award fees under dissenters’ rights fee provisions such as RCW 25.15.480(2)(b). Under statutes such as §.480(2)(b), conduct based on “an unreasoned decision made without regard to law or facts” is arbitrary. *Seig Co. v. Kelley*, 568 N.W.2d 794, 804 (Iowa 1997) (citation omitted). Conduct “lacking justification and intended to harass” is vexatious *Id.*; accord *Black’s, supra* at 1701. A dissenter’s prelitigation conduct thus is relevant to whether he or she pursued the judicial appraisal process for some purpose such as to harass or annoy. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 228 (Del. 2005). Also relevant is a dissenter’s failure to “relate its demand to any recognizable method of ... valuation” or respond to settlement proposals. *Santa’s Workshop v. A.B. Hirschfeld Press, Inc.*, 851 P.2d 264, 266-67 (Colo. App. 1993); see also *Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575, 1576-77, 1579-80 (11<sup>th</sup> Cir. 1990) (dissenter’s rejection of \$43.00 offer based on publicly traded stock price and demand for \$85.00 was arbitrary, vexatious, or not in good faith). Thus one who initiates appraisal proceedings “without reasonable cause to believe that there can be a greater recovery than the amount offered by the corporation,” can be found to have acted arbitrarily, vexatiously, or not in good faith and held

liable for the defendant's fees. *Application of Deutschmann*, 281 A.D. 14, 116 N.Y.S.2d 587, 585 (1952); accord *Leighton v. Am. Tel. & Tel. Co.*, 397 F. Supp. 133, 136 (S.D.N.Y. 1976) (citing *Deutschmann*).

Here, the trial court found Humphrey's conduct to be arbitrary, vexatious, or not in good faith. Substantial evidence supports its finding with or without reliance on Clay I's CR 68 offer. The Court of Appeals properly affirmed respondents' fee awards.

**C. Given the Substantial Evidence of Humphrey's Arbitrary, Vexatious, and Not in Good Faith Conduct, a Remand Was Unnecessary**

Humphrey's final assertion is that the Court of Appeals deprived him of the constitutional right of access to the courts by failing to order a fee award remand after it held the trial court erred in considering his rejection of Clay I's CR 68 offer. This claim fails because it is based on the mistaken assertion that the fee award was premised solely on Humphrey's rejection of the CR 68 offer. As described above, it was not.

In any event, Humphrey misapprehends the law. Fee requests should not result in a second major litigation. *Columbus Mills*, 918 F.2d at 1578. The constitution requires only that a party have an opportunity to contest the opponent's need for the legal services provided and reasonableness of the fees claimed. *Reid v. Dalton*, 124 Wn. App. 113, 124, 100 P.3d 349 (2004), review denied, 155 Wn.2d 1005 (2005). Moreover, a fee award remand is warranted only if the record is insufficient for the appellate court to determine the basis of the trial court's ruling. *Leoffelholz v. Citizens for Leaders with Ethics &*

*Accountability Now*, 119 Wn. App. 665, 692-93, 82 P.3d 1119, *review denied*, 152 Wn.2d 1023 (2004).

That is not the case here, where the trial court made fee-award findings supplemented with four pages of narrative describing the parties' litigation history and the bases for its arbitrary, vexatious, not in good faith finding, and expressly incorporated findings and conclusions made in the valuation trial. *See* CP 2320-32, 2327 ¶ 1, 2329 ¶ 1. The trial court's reliance on such a wealth of evidence, and in particular on Humphrey's July 2005 rejection of an offer nearly identical to Clay I's October 2006 CR 68 offer,<sup>7</sup> provides ample support for the trial court's finding of arbitrary, vexatious, or not in good faith conduct and its conclusions of law. Given that evidence, a remand was clearly unnecessary.

Lastly, as previously noted, *see* Answer to Pet. at 17-19, Humphrey's related argument that it was deprived of a full and fair opportunity to litigate is inaccurate. The record includes hundreds of pages of post-trial fee award submissions. CP 1682-1911, 1934-2012, 2070-89, 2453-93, 3155-3397, 3423-3796. The trial court observed the parties during a weeklong trial. That the trial court ruled against Humphrey does not mean he did not enjoy his day in court.

<sup>7</sup> To the extent Humphrey rests his petition for review on the Court of Appeals' rejection of the trial court's reliance on the CR 68 offer, his arguments fail because the identical results flow from Humphrey's rejection of Clay I's July 2005 offer. Indeed, if this matter were remanded, respondents could be entitled to recover fees and costs dating back to that offer, resulting in a potentially greater award.

## V. RESPONDENTS' REQUEST FOR FEES

The Court of Appeals awarded respondents their reasonable attorney fees and expenses on appeal under RCW 25.15.480(2)(b) and RAP 18.1. Op. at 16. Pursuant to the same authority, respondents request an award of the additional attorney fees and expenses they have incurred in the Supreme Court.

## VI. CONCLUSION

It is time to end Humphrey's campaign against respondents. The evidence fully supports the Court of Appeals' affirmance of the trial court and the relevant law belies Humphrey's arguments. For these reasons, and for all the additional reasons stated above and in their other briefs on file with the Court, respondents respectfully ask this Court to affirm the Court of Appeals and to award them their reasonable fees and expenses.

DATED this 7<sup>th</sup> day of August, 2009.

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